create an estoppel are, first: representations or admissions of material facts inconsistent with the claim the party making them proposes to set up, *Holcomb* v. *Boynton*, 151 Ill. 294; *Estis* v. *Jackson*, 111 N. C. 145, 32 Am. St. Rep. 784, second: the representations or admissions must be wilfully intended to lead the party setting up the estoppel to rely upon them, *Leather &c. Bank* v. *Morgan*, 117 U. S. 96; *Lackman* v. *Kearney*, 142 Cal. 112, 75 Pac. 668; *Hardy* v. *Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, third: they must be made with a knowledge of the facts by the party to be estopped, *Keifer* v. *City of Bridgeport*, 68 Conn. 401, 36 Atl. 801; *Fay* v. *Slaughter*, 194 Ill. 157, 62 N. E. 592; *Smith* v. *Miller*, 66 Tex. 74, 17 S. W. 399, fourth: the party claiming to be influenced must be ignorant of the facts, *Kiefer* v. *Klinsick*, 144 Ind. 46; *Adams* v. *Ashman*, 203 Pa. St. 536, 53 Atl. 375; *Brothers* v. *Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786, fifth: the party setting up the estoppel must do some act in reliance upon the representations, *Lincoln* v. *Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; *Hull* v. *Hull*, 48 Conn. 250, 40 Am. Rep. 165, whereby he will be substantially injured if the other party is permitted to retract his statements, *The Penn. &c. Co.* v. *Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273; *Goodwin* v. *Norton*, 92 Me. 532; *Kirkham* v. *Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714. In the principal case it is not apparent how the appellant was prejudiced by the representations and admissions of the appellee. A party is not estopped from asserting a claim on the trial by the fact that he made a different representation in regard thereto to the adverse party before the trial, where the latter was not misled thereby. *Fischer* v. *Johnson*, 106 Ia. 181, 76 N. W. 658; *Troy* v. *Rogers*, 113 Ala. 131, 20 South. 999; *Pearson* v. *Brown*, 105 Ga. 802, 31 S. E. 746. Had the appellee made no representations or admissions, but had simply refused to pay the appellant, she would have had to take the same steps to enforce her claim and her action would have been open to the same defenses.

EVIDENCE—ADMISSIBILITY OF DECLARATION OF PAIN AND SUFFERING.—In an action by a passenger against a carrier to recover damages for personal injury, the court allowed witnesses to testify as to exclamations of present pain and suffering made by the plaintiff several months after the injury. *Held*, that the admission in evidence of such exclamations in support of the issues in the case was not error, even though they were not admissible as a part of the res gestae. *Colorado Springs & I. R. Co.* v. *Allen* (1910), — Colo. —, 108 Pac. 990.

It must be conceded, that according to the weight of authority in the United States, exclamations of pain or of physical or mental suffering being undergone at the time, are admissible in evidence as substantive and original evidence of a mental condition or state, whether such exclamations be made under circumstances so intimately connected with the occasion of injury as to constitute a part of the res gestae, or whether they are made at a time and place considerably removed from that of the injury. *Travellers Ins. Co.* v. *Mosly*, 8 Wall. 397; *Anderson* v. *Citizens St. R. Co.*, 12 Ind. App. 194; *Will* v. *Mendon*, 108 Mich. 251; *Ashton* v. *Detroit C. R. Co.*, 78 Mich. 587;

Indiana R. Co. v. *Maurer,* 160 Ind. 25; *Battis* v. *Chicago R. I. & P. R. Co.,* 124 Iowa 623; *Beath* v. *Rapid R. Co.,* 119 Mich. 512; *Tex. C. R. Co.* v. *Wheeler* (Tex. Civ. App.) 116 S. W. 83; *Duffy* v. *Consol C. Co.,* (Ia.) 124 N. W. 609. Conceding the general rule to be as stated, still upon principle, such exclamations should not be received if they are made so long after the original source of injury that there is any appreciable danger that their utterance was not entirely an involuntary expression of present suffering, but rather one prompted to a considerable degree by politic and self-seeking considerations. See WIGMORE EVID. §§ 1718, 1719. Keeping in mind this fundamental prerequisite of their admissibility it would seem that the court in the principal case pushed the rule admitting such exclamations and declarations to its fullest extent, if not to a point to which it would be unsafe to go in all cases. Some courts expressly reject exclamations of pain and suffering made a considerable period of time after the original injury. *Olp* v. *Gardner,* 48 Hun 169; *Barelle* v. *Pa. R. Co.,* 51 Hun 540; *Ryan Porter Mfg. Co.,* 57 Hun 253; *Gulf C. & S. F. R. Co.* v. *Ross,* 11 Tex. Civ. App. 201; *Kelly* v. *Detroit L. & N. R. Co.,* 80 Mich. 237; *Lake St. El. R. Co.* v. *Shaw,* 203 Ill. 39; *Union Pac. R. Co.* v. *Hammerlund,* 70 Kan. 888; *Klingman* v. *Fisk & Hunter Co.,* 19 S. D. 139; *Donohue* v. *Brooklyn I. C. & S. R. R. Co.,* 65 N. Y. Supp. 634, 53 App. Div. 348. Still other courts reject such subsequent exclamations only when made after suit for the injury has been commenced, or when made to persons with the evident purpose of qualifying them as witnesses in contemplated litigation. *Mott* v. *Detroit G. H. & M. R. Co.,* 120 Mich. 127; *Chicago & E. I. R. Co.* v. *Donworth,* 203 Ill. 192; *Dorrigan* v. *R. Co.,* 52 Conn. 291; *Grand Rapids & I. R. Co.* v. *Huntley,* 38 Mich. 537; *Laughlin* v. *R. Co.,* 80 Mich. 154. Some states, notably New York, exclude all statements of pain and suffering unless made to a physician for purpose of receiving medical treatment. See, *Chicago St. R. Co.* v. *Kennely,* 170 Ill. 508; *Reed* v. *R. R.,* 45 N. Y. 578; *Roche* v. *R. R.,* 105 N. Y. 294, and see also WIGMORE EVID., pp. 2210-2211 for other cases and criticisms of this exception.

FIRE INSURANCE—WAIVER OF CONDITIONS BY AGENT.—A fire insurance policy issued to plaintiff stated that the policy would be void, if the interest of the insured were other than "sole and unconditional ownership," also that no agent had power to waive any condition unless such waiver was attached to the policy. Plaintiff informed the agent that he held under a mortgage foreclosure certificate but the agent failed to record the same. In an action on the policy, *held,* that the company was liable. *Leisen* v. *St. Paul Fire & Marine Ins. Co.* (1910), — N. D. —, 127 N. W. 837.

This decision, in accord with the weight of authority, is interesting chiefly because of the fact that it marks the repudiation by another state of the doctrine of the U. S. supreme court as laid down in *Northern Assur. Co.* v. *Grand View Bldg. Ass'n.,* 183 U. S. 308, reaffirmed in *Penman* v. *St. Paul Ins. Co.,* 216 U. S. 311, 30 Sup. Ct. 312. The court in the present case expressly rejects so much of its former decisions as are in accord with the supreme court. For an exhaustive treatment of this question see 3 COOLEY, BRIEFS OF LAW OF INSURANCE, pp. 2459-2658; VANCE, INSURANCE, pp. 355-